

## **Historic, archived document**

Do not assume content reflects current scientific knowledge, policies, or practices.

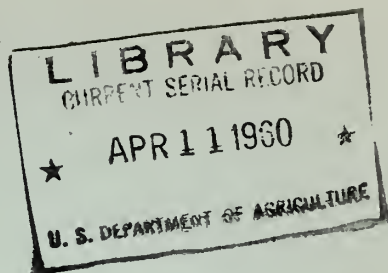


5  
w7

**SUMMARY**

**of**

**COOPERATIVE CASES**



Prepared by

RAYMOND J. MISCHLER, *Attorney*

OFFICE OF THE GENERAL COUNSEL, U.S.D.A.

UNITED STATES DEPARTMENT OF AGRICULTURE  
FARMER COOPERATIVE SERVICE

LEGAL SERIES NO. 12

MARCH 1960



## TABLE OF CONTENTS

Page

Contract Farming - Status of Producer on the Farm - Employee or Independent Contractor . . . . .	1
Definition of Agricultural Labor - Application to Cutting, Field Loading, and Vining of Peas . . . . .	5
Unfair Competition; Payments to Cooperative Distributor Violate "Brokerage" Section of Robinson - Patman Act. . . . .	7
Agricultural Marketing Agreement Act - Jurisdiction of Court in Dispute Between Cooperative and Handler Covered by Order . . . . .	12
Labor Relations; Picketing Beyond Area in Which Dispute Arises . . . . .	15

The comments on cases reviewed herein represent the  
personal opinion of the author and not necessarily  
the official views of the Department of Agriculture.



## CONTRACT FARMING - STATUS OF PRODUCER ON THE FARM -

## EMPLOYEE or INDEPENDENT CONTRACTOR

(Marcus v. Eastern Agricultural Association, Inc. N.J.  
Super. \_\_\_\_\_, Sup. Div. Case No. A-523-58, Dec. 28, 1959)

This is the first decision coming to our attention which considers the status of an agricultural producer on the farm where he is operating under a contract of vertical integration. The "farmer" in this case was injured. He claimed workmen's compensation on the ground that he was in fact the "employee" of the company with which he had contracted. The court, with one judge dissenting, held that the farmer was not an employee but an independent contractor and denied his claim for compensation. The award had previously been allowed by the State Commission and approved by the County Court.

The facts were, briefly, as follows:

Petitioner Marcus and his wife jointly owned a chicken farm in Farmingdale, New Jersey, acquired in 1949, where they produced eggs for sale. Early in 1957, Marcus entered into an oral arrangement with Eastern Agricultural Association, Inc., (hereafter called "Eastern") whereby he agreed to raise on his farm chicks owned by Eastern at a price of \$10.00 a week per thousand chicks. When the number of chicks averaged 7,500 to 8,000 a new arrangement was entered into orally fixing the payment at \$70.00 (later \$75.00) a week for his "services and facilities". Eastern made no deductions for social security, withholding, or any other tax.

Feed for the chickens was supplied by Eastern, and Marcus was instructed how to feed the chickens and how to administer medication. He was instructed to call in a veterinarian when necessary, at the expense of Eastern. The advices were generally by telephone but one of Eastern's employees came to the farm about once a month. Under instructions from a representative of Eastern, Marcus changed the gas heating system for which Marcus paid. On December 7, 1957, Marcus was working in the chicken house when one of the stoves exploded, as a result of which he sustained multiple burns.

From the date of oral arrangement until date of accident, all equipment owned and maintained by Marcus was used exclusively for raising of chickens owned by Eastern. Approximately 2 acres of the farm were devoted to poultry raising activities and from January 1, 1956, to January 1, 1959, about 10 acres were leased out for the raising of corn for an annual rental of \$100. No other kind of activity for profit was conducted on the farm. The defendant devoted all his time to the chickens, and his wife also assisted him for as much as 5 hours a week when required but no other employees were used.

The court pointed out that the term "employee", as defined in N.J.S.A. 34:15-36, is not limited to narrow common-law concepts but "includes all natural persons \* \* \* who perform service for an employer for financial consideration". It said that this factual situation "presents a case of novel impression".

"The rule applicable here, as in any case where the character of the relationship between the parties is in issue, is simply that it \* \* \* must be resolved by a balancing of the various elements presented by the entire complex of facts with which the court is confronted. The element of control is one most stressed in the cases'. Piantandia v. Bennett, 17 N.J. 291, 294 (1955). The element of control is the 'determinative factor' and the criterion by which each case is determined. Wilson v. Kelleher Motor Freight Lines, Inc., 12 N.J. 261 (1953); DeMonaco v. Renton, 18 N.J. 352 (1955). The status of the petitioner is to be resolved upon the totality of the facts surrounding the relationship with due regard for the attendant circumstances, the object in view and the course of practice in its execution. Hannigan v. Goldfarb, supra.

"In Errickson v. Schwiers, 108 N.J. L.481, 483 (E & A 1931) it was held that:

'An independent contractor is one who, carrying on an independent business, contracts to do a piece of work according to his own methods and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work.'

"Generally, it may be said that where the employer retains the right to direct the manner in which the business shall be done,

as well as the result to be accomplished, or in other words, not only what shall be done, but how it shall be done, the relationship of employer and employee exists. Hannigan v. Goldfarb, supra; Errickson v. Schwiers, supra.

"When the manner of performing the service is beyond another's control because of its nature, absence of direct control over such details becomes insignificant in the over-all view of the facts and circumstances to be taken into account in determining the relationship. DeMonaco v. Renton, supra. The control test is satisfied when the employer has the actual right of control and it is not requisite to prove its actual exercise. Mahoney v. Nitroform Co., Inc., 20 N.J. 499 (1956)."

The majority of the court considered that the facts here did not sufficiently demonstrate that Eastern either possessed the right of control over the petitioner in his work or the actual exercise of such a right.

It cited the testimony of Eastern's secretary, Mr. Boyarin, which was that Marcus received only the same services provided to all farmers to whom Eastern sold chicks. Also the president of Eastern testified that he exercised "no control over" Marcus.

"We conclude that the petitioner was a skilled poultry man. He described himself as a 'chicken farmer'. The Deputy Director noted that petitioner 'probably knew more about raising chickens than those who were in the Eastern Agricultural Association'. He did not require or receive the type of supervision or direction sufficient to spell out control. The instructions he received were the same as those furnished by respondent as a service to its customers to whom it actually sold chicks. It certainly cannot be urged that in rendering such service to its customers, respondent exercised control over them. We fail to see how this indisputable custom in the trade can be given any greater effect in the stated instance. In 1 Larson's Workmen's Compensation Law, § 44.20 the author says that '\* \* \* an owner, who wants to get work done without becoming an employer, is entitled to as much control of the details of the work as is necessary to ensure that he gets the end result from the contractor that he bargained for. In other words, there may be a control of the quality or description of the work itself, as distinguished from control of the person doing it, without going beyond the independent contractor relation. \* \* \*'

"The end result here desired was quality chicks. The instructions to petitioner as to feed and medication were to insure that result. Beyond that, petitioner was free to select his working hours. He had no fixed time in which to perform. He was not controlled in the day by day performance of his work. He utilized his land and extensive equipment in the manner he deemed expedient. The fact that on one occasion he changed a gas heating system on his plant at the direction of the respondent is not persuasive of the existence of the employer-employee relationship. Employees do not ordinarily defray the cost of such improvements. We think he made the change and paid for it, in order to keep the respondent's business.

"Nor is the fact that respondent provided the feed upon petitioner's order of determinative significance. The pending litigation against petitioner for feed purchases may explain the necessity for this phase of their arrangement."

Nor did the court consider the method of payment used here a "significant indicia of employee status", since it was related to boarding and raising of approximately 7,500 to 8,000 chicks. Further, the court found no right to fire, but, instead, a "mutual right to terminate an independent contractor relationship in the nature of a bailment at will. . ." It also regarded the "land and facilities of the petitioner used to feed and raise the chicks as a major factor in determining the relationship between the parties. The essence of the contract was not petitioner's personal labor, but rather his land and valuable equipment. The number of chicks delivered to petitioner to raise was dependent upon the quantity available, and the extent of his facilities and equipment, not upon his labor".

Finally, the court considered the "relative nature of the work test" inapplicable here. It said: "Under this test are considered whether the work performed is an integral part of the respondent's regular business, and whether the petitioner in relation to the respondent's business is in a business of his own. Respondent maintained its own place to raise chicks and to produce and sell eggs. At the time of the hearing before the Division of Workmen's Compensation, petitioner was the only farmer to whom respondent sent chicks to be raised. No evidence was presented to establish the totality of respondent's operation and the relation of petitioner's work to respondent's total business. Furthermore, as already observed, petitioner was a chicken farmer engaged in

his own business of maintaining poultry, producing and selling eggs, until one month before his arrangement with respondent. He had not been financially successful. We view the arrangement as a resumption of a phase of petitioner's own business, with the financial security, meager as it was, of an independent contract. "

# # #

#### DEFINITION OF AGRICULTURAL LABOR

##### APPLICATION TO CUTTING, FIELD LOADING, AND VINING OF PEAS

(Rev.Rul. 60-71, I.R.B. No. 1960-8, p. 23)

Farmers grow peas on their farms for a canning company pursuant to a written contract whereby the canning company uses its own employees and machinery in cutting, field loading, and vining the peas. The vining is done either at the cannery or at the farm of the grower, depending upon the circumstances. Held, services performed by the canning company's employees on the farms of the growers in connection with cutting and field loading the pea vines for delivery to the vining station constitute "agricultural labor" as defined in section 3121(g) of the Federal Insurance Contributions Act. Held further, services performed by the company's employees in the vining operation do not constitute "agricultural labor."

Advice has been requested whether services performed in the employ of a canning company in cutting, field loading, and "vining" peas constitute "agricultural labor" as defined in section 3121(g) of the Federal Insurance Contributions Act (chapter 21, subtitle C, Internal Revenue Code of 1954).

equipment (hereafter called MEC) seeking to recover treble damages for alleged violations of the Robinson-Patman Act amendments to the Clayton Act. MEC moved for summary judgment which was granted. The District Court held that MEC was not liable in damages to KRECC, for terminating its selling agreement with KRECC. This was because MEC's contract with KRECC had involved illegal payments of brokerage to KRECC. The court said that since KRECC is a cooperative making all of its sales to rural electric cooperative corporations which either owned it or are entitled to share and participate in all of its profits on basis of purchases, it was unlawful for a manufacturer to pay a commission, discount or brokerage fee to KRECC, an intermediary in behalf of buyer and subject to the direct or indirect control of buyer.

KRECC is not an operating rural electric cooperative corporation, but a "super cooperative" owned and controlled by the operating cooperatives; its function being to purchase materials, supplies and equipment for its members, seeking orders from no purchasers other than rural electric cooperative corporations.

In April 1949 it began business as a distributor of electrical transformers manufactured by MEC and until October 15, 1955, acted in such capacity, distributing transformers to rural electric cooperative corporations in Kentucky. It sold approximately \$4,000,000 worth. KRECC also maintained and operated warehouses for the transformers. However, on October 15, 1955, pursuant to a previous notice, MEC refused to accept further orders. KRECC alleged that MEC had acted arbitrarily and without right in terminating the previously existing agreement, thereby (a) lessening competition between distributors, suppliers, jobbers and manufacturer's sales representatives of electrical equipment, and tending to destroy and prevent competition; (b) creating an unlawful discrimination in favor of certain distributors, suppliers, jobbers and manufacturer's sales representatives in competition with KRECC; and (c) preventing KRECC from obtaining similar electrical equipment on the same basis.

For the damage suffered, KRECC sought judgment in the amount of \$472,666.20; three times the actual damage allegedly sustained.

MEC denied the material allegations of the complaint and alleged as an affirmative defense that all of the sales involved were to rural electric cooperative corporations engaged in the business of generating and distributing electric energy (98.14 per cent to

members and 1.86 per cent to nonmembers who nevertheless participated on a patronage basis in KRECC's "profits"); that KRECC was acting as agent and representative of both the member cooperatives and the participating cooperatives; and that the member cooperatives were the owners of KRECC, which was subject to the direct and indirect control of the member cooperatives.

For the foregoing reasons, MEC alleged that the paying or granting by it to KRECC, and the receiving or accepting by KRECC from it of commission, brokerage, or other compensation or discount upon the purchase by member cooperatives and the participating cooperatives of transformers and other equipment manufactured by MEC was unlawful by reason of Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act, and that the agreement between the two for the making of such payments, allowances, discounts or commissions was illegal, unenforceable, and void.

Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, §13 (c), Title 15 U.S.C.A. provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance of discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, ware, or merchandise, either to the other party to such transaction or to an agent, representative or other intermediary therein where such intermediary is acting in fact for or in behalf of, or is subject to the direct or indirect control, any party to such transaction other than the person by whom such compensation is so granted or paid."

The court cited and quoted from such cases as Oliver Bros., Inc. v. Federal Trade Commission, 4 Cir., 102 F. 2d 763 and Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, 3 Cir., 106 F. 2d 667, to establish that this section prohibits the payment of brokerage, or a discount in lieu of brokerage, to a buyer or representative of a buyer. The court also cited numerous decisions holding that the intermediary or broker cannot receive fees from the seller which he in fact turns over to the buyer.

The court then continued:

Plaintiff's counsel seeks to avoid the teaching of the above cases as to the meaning of Section 2(c) by such cases as Bruce's Juices v. American Can Co., 330 U.S. 743, 67 S. Ct. 1015, 91 L.Ed. 1219; Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 71 S. Ct. 259, 95 L.Ed.219; Moore v. Mead Service Co., 10 Cir. 190 F. 2d 540; Noerr Motor Freight v. Eastern Railroad Presidents Conference, D.C., 155 F. Supp. 768.

The sole question decided in the case of Bruce's Juices, as stated by the Supreme Court, is whether notes given for purchases are unenforceable if the quantity discount plan violates the Act (Robinson-Patman Act). At page 750 of 330 U.S., at page 1018 of 67 S. Ct., in the opinion the Court said:

The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the Act is made criminal and upon conviction a violator may be fined or imprisoned. \* \* \* Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee.

However, on page 755 of 330 U.S. at page 1020 of 67 S. Ct., the court continued:

"This Court has held that where a suit is based upon an agreement to which both defendant and plaintiff are parties, and which has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought, the Court will entertain the defense that the contract in suit is illegal under the express provision of that statute. Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227, 29 S. Ct. 280, 53 L.Ed. 486."

On page 756 of 330 U.S., at page 1021 of 67 S.Ct. of the opinion in Bruce's Juices, *supra*, citing McMullen v. Hoffman, 174 U.S. 639, 19 S.Ct. 839, 43 L. Ed. 1117, the Supreme Court said, "If in order to prove his own case, a plaintiff proves his violation of law, then no court will aid the plaintiff to recover."

We think plaintiff's reliance upon the Kiefer-Stewart case, supra, is likewise unfounded. Kiefer-Stewart's suit against Seagram charged the latter with conspiracy with other distillers to maintain a fixed minimum retail price for liquor by selling only to wholesalers who agreed to maintain the fixed maximum retail price. Seagram's defense was that Kiefer-Stewart had entered into illegal agreements, fixing minimum retail prices, with other Indiana wholesalers. Hence, the suit was not between parties who had entered into the same illegal contract, the alleged breach of which constituted the gravamen of the suit. The Supreme Court held this defense unavailing.

Following the Kiefer-Stewart opinion, in the case of National Transformer Corp. v. France Mfg. Co., 215 F. 2d 343, 361, the Court of Appeals for the Sixth Circuit said:

"It may be here emphasized that a contract which cannot be performed without violation of a statute is illegal and void. Where parties are in pari delicto, the law will leave them where it finds them, and all relief is refused because of the public interest. Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 51 S.Ct. 476, 75 L. Ed. 1112. The defendant may assert the invalidity of an agreement, even though he is a participator in the wrong. Standard Lumber Co. v. Butler Ice Co., 3 Cir., 146 F. 359. The defense of illegality is allowed, not as a protection to the defendant, but as a disability to the plaintiff."

See also Pennsylvania Water & Power Co. v. Consolidated G.E. L. & P. Co., 4 Cir., 209 F. 2d 131.

Plaintiff also relies on the Supreme Court's opinion in Kelly v. Kosuga, 358 U.S. 516, 79 S.Ct. 429, 3 L.Ed.2d 475. The Kelly case was likewise a suit to recover the purchase price of commodities sold to it. The defense was sought to be made that the sale was pursuant to an agreement which violated the Sherman Anti-Trust Act, 15 U.S.C.A. §§ 1-7, 15 note. The Supreme Court, on page 518 of 358 U.S., on page 431 of 79 S.Ct. of its opinion said:

"As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act,

has not met with much favor in this Court. This has been notably the case where the plea has been made by the purchaser in an action to recover from him the agreed price of goods sold."

The plaintiff here disavows any intent or purpose that its suit is based on a breach of contract. Conversely, it states that it is for a tort resulting from the violation of a statute. The answer to that contention seems obvious to this Court: if it be tort for the defendant to refuse to continue the transactions with the plaintiff, which by the terms of the statute are unlawful both as to the plaintiff and defendant, then neither plaintiff nor defendant has a valid claim against the other arising out of the alleged tortious refusal to continue such transactions banned by the statute.

# # # # #

AGRICULTURAL MARKETING AGREEMENT ACT - JURISDICTION OF  
COURT IN DISPUTE BETWEEN COOPERATIVE AND  
HANDLER COVERED BY ORDER.

(United States v. Tapor-Ideal Dairy Company  
175 F. Supp. 678, (1959))

The authority of the Secretary of Agriculture under the Agricultural Marketing Agreement Act to modify or exempt a handler from an obligation imposed in connection with a marketing order does not preclude a Federal court from taking jurisdiction to determine initially the validity of the handler's defense of accord and satisfaction interposed in the Government's suit to collect an account allegedly owed to a dairy cooperative, according to Judge Weick of the U.S. District Court for the Western District of Pennsylvania.

In an action brought under the Agricultural Marketing Agreement Act (7 U.S.C.A. § 601 et seq., 7 C.F.R. 975), the Government sought a mandatory injunction to compel the defendant, Tapor-Ideal Dairy Company to pay Dorset Cooperative Milk Company \$9,879.02 for milk which Tapor had purchased from Dorset. Tapor denied owing anything to Dorset, claiming that the account was settled on July 17, 1958, by check in the amount of \$28,044.73 which Dorset accepted in full settlement, accord and satisfaction thereof.

In 1955, Tapor had entered into a written contract with Dorset whereby Dorset agreed to furnish the latter's milk requirements for a period of 10 years. The contract price, although based on the minimum price fixed by Federal Order No. 75, called for the payment of a premium over the monthly minimum price set under the order. However, in June 1956, Dorset refused to deliver the milk called for in the contract at the agreed price and stated that Tapor would have to pay additional sums for the milk so as to bring the price more in line with going prices in the area. Tapor did pay Dorset sums in excess of the contract price during the period from October 1956 to February 1957, under protest and against its will because it could not fill its requirements elsewhere. On June 29, 1957, Tapor and Dorset ceased doing business and on July 17, 1957, Tapor sent Dorset a check in full settlement of the account, making on the back thereof the following notation: "Payment in full of all claims and demands per letter of July 17, 1957". The evidence further shows that Dorset cashed the check after typing thereon the following notation: "This check credited to the account of Tapor-Ideal Dairy Co., Inc., not in full payment."

On August 22, 1957, the Marketing Administrator sent a letter to Tapor correctly setting forth the balance due for the milk purchased during the period in question and there was no dispute as to his calculations. The Marketing Administrator then brought this action to compel Dorset to make the additional payment as set forth above.

Basing its claim on Section 608(c)(15) of the Agricultural Marketing Agreement Act, as interpreted by the Supreme Court in U. S. v. Ruzicka, 329 U.S. 287 (1946), the Government argued that the Secretary of Agriculture is "the sole initial forum for any question of any nature arising under the Act;" and, therefore, the issue raised in defense must be taken to that agency for determination.

The court did not agree. He pointed out that in Ruzicka the Supreme Court left open the general question of the availability

of the judiciary as an initial forum. Furthermore, Ruzicka "was rendered under the doctrine of primary jurisdiction, rather than exhaustion of administrative remedies." He continued in part:

"Another indicia that resort to the Secretary of Agriculture was not intended to be the sole initial forum, but rather concurrent with the courts, depend on the nature of the case, is found in the wording of the statute. The crucial phrase states that an aggrieved handler may file a petition with the Secretary of Agriculture.

\* \* \*

"It is my conclusion that under the statute in question, as interpreted by the Supreme Court in the Ruzicka case, a court has jurisdiction to hear disputes arising under the Marketing Act, so long as they are strictly of a legal nature, require no special understanding of the milk industry, and the assumption of jurisdiction would not hinder or adversely affect the orderly administration of the program.

"To require every issue arising under the Act to be taken before the Secretary of Agriculture would be folly. Just as he may be particularly qualified to rule on complex questions involving the milk industry, so the courts are qualified to act as, and should be, the initial forum for pure legal questions having no relation to the marketing of milk."

Having decided that the Court had jurisdiction, the Judge proceeded to consider the defense on the merits and held that (a) the question was controlled by Ohio law, (b) there was an accord and satisfaction, and (c) the handler was entitled to claim a setoff and effect an accord and satisfaction to resolve the dispute arising over the claim. On the latter point, the Judge said:

"By bringing suit in its name, the Government does not acquire additional rights. It stands in the shoes of Dorset. The Government cannot compel the defendant to pay to Dorset a claim which, under the law, it does not owe.

"The Government relies upon the decision in Pennsylvania Milk Control Commission v. Royale Dairy Co., 1948, 73 Pa. Dist. & Co. R. 431, and two decisions of the Judicial

Officer of the Department of Agriculture (1 A.D. 721) (10 A.D. 1165) for the proposition that no set-off may be taken in one month for over-payments in a prior month, hence the accord and satisfaction was ineffectual.

"The distinguishing factor between those cases and the one at bar is the contract.

"In the cited cases there were no contracts involved. As a result, the prices paid over the minimum were the effect of the law of supply and demand. Consequently, it is entirely proper that such higher payments should not be allowed as a set-off in later months.

"But, here, where the dairy cooperative was under a legal obligation to supply milk at a given price, and required payments over that price, the situation is different. To condone such action would be to give judicial sanction to a breach of contract.

## ## ## ## ##

#### LABOR RELATIONS; PICKETING BEYOND AREA

##### IN WHICH DISPUTE ARISES

(Cooperative Refinery Association, v. Williams,  
Kan., 345 P.2d 709 (1959))

The court held in this case that certain labor activities, more fully described below, were neither protected nor prohibited by the Labor Management Relations Act, 1947 (29 U.S.C. 141 et seq.) and that Congress has not clearly manifested an intention to withdraw from the States power to exercise jurisdiction under such circumstances. Accordingly, where, as in this case, the union had engaged in practices clearly in violation of a State statute, it held that the trial court had erred in (1) dissolving

a temporary restraining order against the activities and (2) sustaining defendants' demurrer to plaintiffs' evidence and dismissing the actions.

The Consumers Cooperative Association, a Kansas cooperative corporation (hereinafter referred to as CCA) licensed to do business in Missouri, was struck by Teamsters Local Union 41, following expiration on March 31, 1958, of the contract between the parties. For approximately two and one-half weeks, only CCA's Missouri and Kansas City, Kansas facilities were picketed. However, the Union then sent persons to Lawrence, Kansas, to picket the Cooperative Farm Chemicals Association and to Coffeyville, Kansas, to picket Cooperative Refinery Association. Both the latter plants are separate corporations, but CCA owns substantial stock in each. Each of these plants brought separate suits to enjoin this activity as being in violation of State law. The suits were similarly handled in the trial courts, so the appeals were consolidated and heard on the basis of the facts in the Cooperative Farm Chemicals Association (hereinafter called Association) case.

No dispute existed between the Association and its employees. These employees were represented by an entirely different local, and had a valid collective bargaining contract in effect at that time. Evidence showed that the picket line set up by the members of the Teamsters Union from Kansas City were set up so that drivers of intrastate and interstate truck lines would be misled and caused to believe that a dispute existed between the Association and its employees so that such drivers would refuse to cross the picket lines. The picketing had its intended effect in that drivers refused to pick up or deliver shipments from the Association's plant, thus seriously disrupting the Association's business. The Association could make no concession or other agreement which would in any manner solve or affect the picketing being carried on at the Lawrence, Kansas, plant, nor could it do anything which would tend to settle the strike in Missouri.

The Union argued that the trial court was without jurisdiction by reason of the so-called Federal pre-emption doctrine, and, therefore, no State court could grant an injunction regardless of whether the picketing was lawful or unlawful under the provisions of either the State or Federal law. It argued that whether an activity is protected or prohibited by the Federal Act or whether such activity is neither protected nor prohibited by it must, in the first instance, be determined by the National Labor Relations Board and that such a determination cannot,

therefore, be made by a State court. They further contended that it makes no difference whether such activity is protected or prohibited by the Act or is neither protected nor prohibited because State courts have jurisdiction over only one area in labor relations matters affecting interstate commerce, such areas being violence in the labor dispute. The following cases were cited: Plumbers etc. Local 298, A.F. of L. v. County of Door, 359 U.S. 354, 79 S.Ct. 844, 3 L.Ed. 2d 872 and San Diego Building Trades Council, etc., v. Garmen, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775.

The Association contended that the defendants' activity was neither protected nor prohibited by the Act and that under such circumstances State courts have repeatedly exercised their jurisdiction to enjoin even peaceful picketing such as was involved in this case.

The court, after fully reviewing the facts in relation to the Federal statute, found that the picketing carried on here was neither protected nor prohibited by that Act. It said in summary at p. 714:

"Where the activity is neither protected nor prohibited by the Act and is not federally regulated, then NLRB has no power to entertain the action and, therefore the activity is 'governable by the State or it is entirely ungoverned.' In such cases the Supreme Court has declined to find an implied exclusion of state power. International Union, U.A.W., A.F. of L., Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245, 254, 69 S. Ct. 516, 93 L. Ed. 651.

# # # # #





